

REMARKS/REPLY-ARGUMENT

This is in response to the Examiner's Answer dated January 23, 2009. The arguments set forth in the Appeal Brief dated September 23, 2008 are incorporated herein by reference, and Applicant will not repeat the same herein. The following arguments are presented in response to the new arguments presented in the Examiner's Answer and also further clarify Applicant's previous positions.

First, the Examiner's Answer responds to Applicant's argument that the alleged combination of Capazario, Huang, and Dovolis does not teach or suggest each and every limitation of the independent claims by simply repeating the rejection of claim 1 and producing a significant body of text related to what appear to be the Examiner's favorite cases. Applicant agrees with the Examiner that obviousness must be determined on the basis of the evidence as a whole. Of course, the relative persuasiveness of the arguments is to be considered. In any event, when properly using this standard, the Examiner clearly has not yet presented a prima facie case of obviousness, since the Examiner has not presented evidence of corresponding claim elements in the prior art. For example, the Examiner still has not presented any evidence whatsoever of where in the prior art the claim 1 and 13 features of allocating "a launch quantity to each account for a new product launch and allocates product to each account for replenishment of a previously launched product, based on the allocation method assigned to the product and in accordance with a predefined business allocation goal provided by the sales administrator for the plurality of locations," is to be found.

Moreover, contrary to the assertion in the Examiner's Answer, the Examiner has not expressly articulated the "combinations and the motivations for combinations . . . that fairly suggest Applicant's claimed invention." In the context of cited prior art that fails to teach many of the claimed features, it is difficult to understand how one of ordinary skill in the art at the time of the invention would have found it "obvious" to make any combination of the features that are actually disclosed in either of these three references. And even if all of the features of all of the references are somehow "combined," they still necessarily fail in that combination to teach or suggest many of Applicant's claimed features, including those specifically noted in Applicant's Appeal Brief and hereinabove.

The Examiner's Answer argues that the outstanding grounds of rejection, which combine alleged features of the various references, are based on "the scientific and logical reasoning of one skilled in the art at the time of the invention." However, Applicant is at a loss as to how to understand how "logic and scientific reasoning" can create something out of whole cloth. Unless the claimed features of the invention can be found in at least one of the cited references, there is no "logic and scientific reasoning" available that would permit the combination of these references to somehow cause such features to appear for the first time -- much less to then be combinable in the manners alleged by the Examiner. Moreover, it is unclear how "logic and scientific reasoning" can be applied to mere abstractions of thoughts, as once again presented in the middle of page 14 of the Examiner's Answer. To the contrary, the abstractions re-presented in the Examiner's Answer are ungrammatical snippets of the claims that defy all "logic and

scientific reasoning.” There simply is no “logic and scientific reasoning” that can make sense of the abstractions of the specific claim limitations represented in the middle of page 14 of the Examiner’s Answer -- much less in a manner that is combinable in such a way as would render the claimed invention obvious.

Applicant generally agrees with the Examiner’s quotation from prior case law to the effect that the Examiner can satisfy the burden of establishing a *prima facie* case of obviousness only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references. However, for the reasons already noted, Applicant respectfully submits that the Examiner in this case has not satisfied this agreed-upon burden. That is, so far as Applicant can ascertain, there are no objective teachings or suggestions in the cited prior art for many of the claimed features of the invention -- much less any knowledge to be gleaned from the four corners of the prior art references, even if combined, that would demonstrate knowledge generally available to one of ordinary skill in the art that would lead that individual to combine purportedly “relevant teachings” of the references. Applicant cannot divine how or what “generally available knowledge” is being relied upon in the Final Office Action and in the Examiner’s Answer in rejecting the claims. This is, in fact, the Examiner’s burden.

The Examiner alleges, to the contrary, that each and every modification to combine the applied references is accompanied by selected portions of the respected references that specifically support that particular motivation and/or an explanation based

on the logic and scientific reasoning of one ordinarily skilled in the art at the time of the invention. However, the Examiner's allegations are not supported by the portions of the references cited in the previous Office Actions, as shown in detail in the Appeal Brief. Furthermore, Applicant has studied the entirety of these references and failed to find anywhere in these references the features the Examiner alleges to find. If there are specific and explicit teachings as alleged by the Examiner in any of the applied references, then the Examiner has failed to identify them and Applicant has failed to unearth them. Such is perhaps best demonstrated by the fact that the Examiner has failed to specifically point out where many of the claimed features are to be found in the prior art, and has simply reproduced selected portions of the specific claim limitations -- divorced from their proper contexts -- and left it up to Applicant to determine how and why one of ordinary skill in the art at the time of the invention would have been led to the claimed invention. But Applicant cannot, and legally is not required to, satisfy the Examiner's burden in making out a *prima facie* case of obviousness.

In a nutshell, the Examiner's alleged combination of references, which is wholly inappropriate in any event, fails to teach or suggest each and every limitation of the claimed invention. Thus, merely repeating an erroneous rejection in the "Response" section of an Examiner's Answer does not make it any less erroneous.

Second, with respect to Applicant's argument that the Examiner's alleged combination is nothing more than an attempted hindsight reconstruction of the claims, it appears that the Examiner simply has reproduced a boiler-plate form paragraph supplied

in the MPEP and has not meaningfully addressed to Applicant's concerns. While Applicant certainly agrees that one of ordinary skill in the art would not consider prior art embodiments "in a vacuum," the Examiner has not alleged any motivations to combine the "advantageous features of the prior art" and similarly has failed to specify "reasons and motivations" in any prior Office Action, or even in the Examiner's Answer. Astoundingly, the Examiner has not yet even identified the "advantageous features of the prior art" being relied on. Indeed, the Examiner still has failed to admit that he has provided only one conclusory statement in support of why it would have been obvious to one of ordinary skill in the art at the time of the invention to have combined the references in the manner so alleged. A single conclusory sentence cannot, as a matter of law, be sufficient to support the legal conclusion of obviousness. It is upon this fundamental principle of U.S. patent law that Applicant respectfully disagree with the Examiner.

The Examiner apparently has thought it best to omit the paragraphs of reasoning, based on firmly established facts, that would be necessary to support the legal conclusion of obviousness. But it is the Examiner's burden to make this reasoning known -- a burden that the Examiner certainly has failed to meet in this case. To the extent that anything actually is alleged in support of the legal conclusion of obviousness, Applicant notes that the single-sentence "motivation" advanced in the Examiner's Answer simply is a statement that roughly corresponds to the preamble of the independent claims. Such clearly is indicative of improper hindsight. That is, the Examiner arrives at the

“conclusion” that the claims would have been obvious by simply stating that such claims would be obvious. In addition to being a logical fallacy, this type of “reasoning” also is legally improper. The Examiner’s “conclusion” thus is the quintessential case of resort to improper hindsight, since the Examiner’s Answer (belatedly) relies on excerpts of Applicant’s own claims.

Third, with respect to Applicant’s argument that the alleged combination fails to teach or suggest a predefined business allocation goal provided by the sales administrator for the plurality of locations as required by claims 1 and 13, the Examiner simply has stated that he has taken a broad view of this claim language and allegedly has found this in paragraph 91 of Dovolis. However, Applicant still is unable to find any support for such a claim limitation here or elsewhere in Dovolis, or anywhere else in the cited prior art. There are two possibilities: Either the Examiner does not understand the claim limitation, or the Examiner has adopted an extraordinarily broad interpretation of this particular claim limitation without ever actually explaining what this secret interpretation is. In the first case, it is apparent that the cited portion of Dovolis does not disclose the properly understood claim feature in question. In the latter case, not only is the Examiner’s unreasonably broad interpretation improper but, to the extent understood, it also is contrary to how one of ordinary skill in the art would understand the explicit language of the claim. Thus, the Examiner still has failed to identify where exactly in the prior art at least this limitation of claims 1 and 13 is to be found.

Finally, with respect to Applicant's argument that the Examiner has employed a piecemeal examination of the independent claims, Applicant notes that the Examiner has confused the issue by blindly inserting another boiler-plate form paragraph from the MPEP, alleging that Applicant has engaged in a piecemeal analysis of the references. This tactic, even if correct (which it is not), misses the point: The Examiner has abstracted portions of the claim language, reproduced them as fragments of thoughts, and has cited pieces of prior art for such alleged "features" in a manner that cannot be followed. The process of taking a few words from a variety of claim limitations is inappropriate, since every limitation of a claim must be considered and each limitation is to be considered as a whole. But more fundamental than these basic principles of U.S. patent law is the underlying fact that the Examiner's "reasoning" simply does not make sense at all -- much less in the context of the applied prior art.

Turning now to the Examiner's argument -- which only obfuscates the fact that the Examiner has not actually thought about the claim limitations as a whole -- Applicant notes that Applicant's own analysis of the references actually is required by the MPEP. Unlike the Examiner, Applicant has evaluated the scope and content of the prior art. The Examiner apparently has ignored this necessary step in patent claim analysis, leading him to make erroneous rejections based on erroneous findings of "fact" and erroneous combinations of prior art references. Applicant stands behind the reasoning included in the Appeal Brief and prior responses, and continues to believe that the Examiner's piecemeal analysis of the claims is improper.

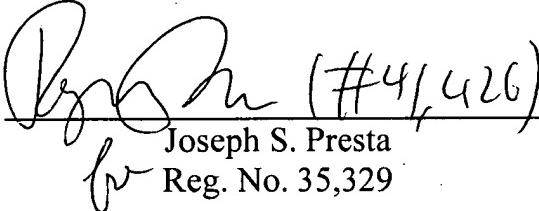
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The Examiner should not be allowed to obfuscate the facts that (1) the claim limitations were never properly considered, and (2) the scope and content of the prior art never was properly resolved. Were the Examiner to have considered all of the claim limitations as a whole, and accurately resolved the scope and content of the prior art, it would have been abundantly clear that the Final Rejection cannot stand.

The application is in clear condition for allowance, and early reversal of the Final Rejection and passage of the subject application to issue thus are earnestly solicited.

Respectfully submitted,

NIXON & VANDERHYE P.C.

By: 
Joseph S. Presta
fp Reg. No. 35,329

JSP:jr
901 North Glebe Road, 11th Floor
Arlington, VA 22203-1808
Telephone: (703) 816-4000
Facsimile: (703) 816-4100